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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 08-13555-jmp

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., ET AL.,

Debtors.

- - - - -x

U.S. Bankruptcy Court  
One Bowling Green  
New York, New York

October 19, 2011  
10:02 AM

B E F O R E:  
HON. JAMES M. PECK  
U.S. BANKRUPTCY JUDGE

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Debtors' Motion for Approval of a Settlement Agreement Among  
ESP Funding I, Ltd., U.S. Bank National Association, as  
Trustee, BNP Paribas, Natixis Financial Products LLC, Lehman  
Brothers Special Financing Inc., and Lehman Brothers Holdings  
Inc.

Debtors' Motion for Approval of Settlement Agreements with (i)  
Bank of America, N.A. and (ii) Merrill Lynch International and  
Its Affiliates

Motion of Deutsche Bank AG to Enforce Settlement Approval Order  
and to Correct Misclassification of Claims

Debtors' Motion for Approval of the Termination of the Spruce  
CCS, LTD. Securitization

Insured Persons' Motion for an Order Modifying the Automatic  
Stay to Allow Settlement Payment Under Directors and Officers  
Insurance Policy to Settle the California Municipalities

Motion of Insured Persons for an Order Modifying the Automatic  
Stay to Allow Settlement Payment Under Directors and Officers  
Insurance Policy to Settle Equity/Debt Class Action

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**Debtors' Motion for Authorization to Grant Limited Releases to  
Certain Insurers Under the Directors and Officers Insurance  
Policies**

**Transcribed by: Dena Page**

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P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.  
Mr. Miller, how are you?

MR. MILLER: Good morning, Your Honor. Your Honor,  
this is an omnibus hearing and we have seven matters on the  
calendar this morning. In connection with the uncontested  
matters, Your Honor, the first matter will be presented by Ms.  
Thompson.

I'm Harvey Miller, Weil, Gotshal & Manges for the  
debtor.

THE COURT: Good morning.

MS. THOMPSON: Good morning. May it please the Court,  
Your Honor. I'm Sunny Thompson from Weil Gotshal Manges on  
behalf of the debtors. We're here today on the debtors'  
uncontested Rule 9019 motion for authorization and approval of  
a settlement between LBSF and LBHI as credit support provider  
on the one hand, and ESP Funding I, Ltd., an SPB, as issuer,  
U.S. Bank National Association, as Trustee, BNP Paribas, as  
holder of certain notes, and Natixis Financial Products LLC as  
the advance swap counterparty on the other hand.

This matter was the subject of an interpleader and a  
counterclaim avoidance action that Your Honor stayed last  
October and the settlement was reached after ADR and the  
mediation, and deals with notes issued under an SPB. And this,  
in addition, this matter involved ipso facto provision like the

1 one you found unenforceable in the BNY decision. Because this  
2 is an interpleader, the proposed order contains some additional  
3 protections for the trustee in entering into the settlement.  
4 The creditors' committee supports the settlement, and the  
5 objection deadline was last week on October 12th, and no  
6 objections have been filed or served on the debtors.

7 This is not the first SPB settlement that has arisen  
8 out of mediation, and it's similar to the Madison Avenue  
9 settlement that Your Honor approved last December. And for the  
10 reasons set forth in the papers, we ask that you approve the  
11 settlement. If Your Honor has any questions, I'm happy to  
12 answer them.

13 THE COURT: Well, there are no objections. I've  
14 reviewed the documents, including the unredacted version of the  
15 settlement agreement, and I'm prepared to approve it. But I  
16 would be interested in the comments, if any, from the  
17 creditors' committee in terms of the creditors' committee  
18 oversight of this particular settlement.

19 MR. FLECK: Good morning, Your Honor. Evan Fleck of  
20 Milbank Tweed on behalf of the official committee. Your Honor,  
21 as was stated, the creditors' committee did review this  
22 transaction, what was involved, as it usually is, in the  
23 settlement approval committee meetings, the analysis of the  
24 merits of the settlement, and on the basis of that interaction  
25 and the independent analysis that the committee did with its

1 financial advisors, the committee believes the settlement is in  
2 the best interest of the estates and does support is approval.

3 THE COURT: Fine. It's approved.

4 MR. MILLER: Harvey Miller again. Your Honor, please,  
5 item 2 on the uncontested portion of the agenda is the debtors'  
6 motion of September 28, 2011 pursuant to Bankruptcy Rule 9019  
7 for the approval of the compromises and settlements with Bank  
8 of America and Merrill Lynch International in connection with  
9 derivative claims asserted by each of those entities and the  
10 resolution of the controversy relating to the Bank of America  
11 setoff litigation that occurred in this court.

12 The motion is uncontested, Your Honor. The motion  
13 sets out in detail the controversy between certain of the  
14 debtors and the respective settlement parties. Briefly, the  
15 compromises and settlements encompass the resolution of claims  
16 asserted by Bank of America and Merrill Lynch based upon  
17 derivatives claims among certain of the debtors in each of the  
18 seven parties. As the Court may recall, at the commencement  
19 date, Lehman entities were parties to approximately ten -- over  
20 10,000 derivatives contracts based essentially on ISDA forms  
21 and engaged in over 1,700,000 transactions involving a variety  
22 of derivative transactions of all types and by their nature  
23 very esoteric, very sophisticated, opaque and difficult to  
24 unwind. The debtors have had a dedicated workforce that has  
25 spent two years in the effort to deal with claims based upon

1 derivatives that had been filed against the debtors and others  
2 as to which the debtors have asserted affirmative claims. The  
3 derivative claims asserted against the debtors total over  
4 seventy-five million dollars.

5 What has resulted out of this work stream is what is  
6 generally described as the derivatives framework. The  
7 derivatives framework provides, one, common dates and times for  
8 calculation of mid-mark values, two, a uniform approach to  
9 portfolio aggregation to derivative groups that netted  
10 exposures, and three, a methodology for calculation of  
11 allowable charges.

12 The derivatives framework has been extremely valuable  
13 in enabling the debtors to reach the resolution with bank  
14 counterparties in obtaining the execution and delivery of plan  
15 support agreements. In addition, it has been material in  
16 reaching the subject compromises with Bank of America and  
17 Merrill Lynch. The Bank of America compromise and settlement  
18 which involves over 22,000 derivative transactions resolves,  
19 one, the Bank of America primary and guaranteed derivative  
20 claims consistent with the derivatives framework. It results  
21 in a total reduction of Bank of America's aggregate derivative  
22 claims, both primary and those based upon guarantees by  
23 approximately 4.5 billion dollars. The remaining claims of  
24 Bank of America, both the primary and the guaranteed claims are  
25 in the area over 500 million dollars. Three, it resolves the

1 setoff litigation, the nature of which and the details relating  
2 to that controversy are set forth in the Court's decision in  
3 November 2010 finding in favor of the debtors in connection  
4 with the setoff of approximately 501 million dollars by Bank of  
5 America. In respect of this tangent of the compromise and  
6 settlement with the Bank of America, the debtors will receive  
7 and recover seventy-one percent of the 501 million dollars in  
8 dispute, and the Bank of America will retain apply approximate  
9 145 million dollars to the derivative claims.

10 In connection with the Merrill Lynch compromise, the  
11 claims of Merrill Lynch are based upon derivative contracts,  
12 and pursuant to the compromise, Merrill Lynch will reduce the  
13 amount of its claims by approximately, in the aggregate, three  
14 billion dollars. As a result, the claims against LBSF and LBHI  
15 will be reduced to approximately 1,100,000,000 dollars; against  
16 LBCS and LBHI, approximately 16.7 million dollars.

17 This compromise and settlement relates to over 27,000  
18 transactions. The nature and details of the transactions among  
19 the debtors and Bank of America and Merrill Lynch are set forth  
20 in detail in the motion, Your Honor, and in the attached  
21 declaration of Daniel Ehrmann. The unsecured creditors'  
22 committee was intimately involved and familiar with all aspects  
23 of the controversies with Bank of America and Merrill Lynch and  
24 has filed a statement in which the committee notes that it has  
25 no objection to the approval of the settlement and that it does

1 believe that the settlement provides meaningful benefits to the  
2 administration of these debtors' cases.

3 The creditors' committee does point out, however, that  
4 it does not believe there's any meaningful risk on appeal to  
5 the Court's decision in connection with the setoff controversy  
6 with Bank of America. Nevertheless, Your Honor, this is an  
7 integrated settlement. And the UCC doesn't object to the  
8 approval of the Bank of America settlement.

9 As the motion sets out in sufficient detail, the  
10 compromise -- proposed compromises meet the standards for  
11 approval under Bankruptcy Rule 9019 and the applicable  
12 precedents in this circuit. The results of the compromises are  
13 well above the lowest rank of reasonableness. The compromises  
14 represent fair, reasonable exercises of prudent business  
15 judgment on the part of the debtors, as witnessed by the lack  
16 of objections. And accordingly, we request, Your Honor, the  
17 compromise and settlements be approved.

18 THE COURT: I'm prepared to do that having read the  
19 papers and the statement of the creditors' committee in support  
20 of the settlement. But I'll simply ask if anyone wishes to  
21 comment before gaveling this down?

22 Apparently there are no comments. It's approved.

23 MR. MILLER: Thank you, Your Honor.

24 We now turn, Your Honor, to the contested matter  
25 portion of the calendar. Item 3 is the motion of Deutsche

1 Bank.

2 MR. KOLOD: Good morning, Your Honor. Alan Kolod of  
3 Moses & Singer. We've been substituted in for Bingham  
4 McCutchen on this motion. Before I reach the merits of our  
5 motion, I just wanted to make a preliminary statement that puts  
6 our motion in the context of overall plan confirmation, which  
7 is proceeding. I wanted to reiterate the point that we make in  
8 our brief that if this Court agrees with the Deutsche Bank's  
9 position on the classification of the claims, requiring them to  
10 be treated like and equally to general unsecured claims, it is  
11 Deutsche Bank's understanding that that will not release any  
12 parties under any plan support agreements. However, it is our  
13 understanding that the plan support agreements tie the debtors'  
14 hands and make it impossible for them to settle this dispute  
15 because that would release parties under the plan support  
16 agreements, so that we're really left with no choice but to ask  
17 Your Honor to decide this dispute. In other words, if Your  
18 Honor were to agree that Deutsche Bank is correct in its  
19 interpretation of the settlement agreement and the court order  
20 to approve that, that would have no adverse effect on the  
21 confirmation of the plan that's proceeding.

22 THE COURT: What's the basis for your confident  
23 statement that that's true?

24 MR. KOLOD: It's based on the plan support agreement  
25 that Deutsche Bank itself has signed. And I'm sure if I'm

1 incorrect about that, I'll be corrected.

2 THE COURT: So do I understand that Deutsche Bank has  
3 signed a plan support agreement but at the same time is  
4 pressing the current motion seeking reclassification of its  
5 claims. Can you explain that to me?

6 MR. KOLOD: Yes, there is an express provision in the  
7 plan support agreement that excludes this issue and permits  
8 Deutsche Bank to defend against the misclassification of its  
9 claims. So that's carved out of the plan support agreement.

10 THE COURT: Okay.

11 MR. KOLOD: Now, I'd also like to point out that  
12 there's some urgency to the decision of this motion because of  
13 the November 4th voting deadline on the plan. The LCPI claim  
14 at issue -- there are two claims at issue on this motion. The  
15 LCPI claim is a billion dollar claim that represents nearly a  
16 third of all of the claims that would be in the LCPI general  
17 unsecured claim class, class 4A, if the claim were properly  
18 classified. Thus, the inability of these claims to vote in  
19 that class could have an adverse effect on the acceptance on  
20 that class of the plan.

21 Now, we've gone through this at great length in our  
22 motion and reply papers, but just to set a stage, it's our  
23 position and it's evident from paragraph 12 of the settlement  
24 agreement which was approved by Your Honor and incorporated  
25 into Your Honor's approval order, that the settlement agreement

1 provides four separate types of relief with respect to the two  
2 claims at issue. First, it allows them as nonpriority  
3 unsecured claims against LCPI and LBHI. Second, it eliminates  
4 all defenses to those claims. Third, it expressly protects  
5 them from any claim that would have the effect of subordinating  
6 their treatment to the treatment of other unsecured -- general  
7 unsecured claims. And fourth, and this is a somewhat unusual  
8 feature, it expressly provides the treatment that those claims  
9 will receive under a plan confirmed in these cases. The  
10 settlement and the court order requires that the claims receive  
11 what I'll use as an abbreviation, like and equal treatment to  
12 other general unsecured claims. Now, I can read the actual  
13 language that's in the settlement agreement and the court  
14 order. I'll do that once, and then afterwards, I'll just refer  
15 to the like and equal treatment requirement. But the  
16 settlement agreement, paragraph 12(k) and this Court's order  
17 approving it provides that the allowed claims "shall be treated  
18 in a like manner to that of other general unsecured claims  
19 against LBHI and LCPI and receive treatment and distribution on  
20 account of such claims equal to that of other general unsecured  
21 claims against LBHI and LCPI." That's the like and equal  
22 treatment provision.

23 Now, it's clear from both the motion and the response  
24 by the debtors that this settlement agreement incorporating  
25 those provisions was very heavily negotiated, and that it went

1 beyond the mere allowance of the claims as nonpriority  
2 unsecured claims, but it expressly provided how they were to be  
3 treated. But at the time that this treatment provision was  
4 negotiated, there were no plans on file, and there were no  
5 defined terms. There were no definitions that one could point  
6 to and say we will be treated in this class. So the parties  
7 had to write something not using defined terms but using  
8 concepts. And the concept they agreed upon was the claims  
9 would be treated like and equal to general unsecured claims.

10 Now, the premise of the agreement is that it's  
11 possible to identify which class in a plan, with respect to a  
12 debtor, is a general unsecured class and to identify what the  
13 treatment is in a plan for general unsecured creditors. Now,  
14 obviously, there was some risk -- it was moral risk at that  
15 time -- that the debtors would attempt to frustrate the  
16 agreement in bad faith by manipulating their drafting of plan  
17 class definitions. Fortunately, and I think it's a testament  
18 to their integrity, in the draft of their initial plan, the  
19 debtors did not do that. They very clearly drafted the plan to  
20 identify the class of general unsecured claims. In fact, this  
21 is as visible as a beacon on a dark night. The class is  
22 actually named "general unsecured claims". But that's more  
23 than just a formal name. It's a description of the claims in  
24 that class and the treatment being provided for those claims.

25 Now, I believe the burden is on the debtors -- under

1 the case law, the burden is on the debtors to justify the  
2 treatment they're providing and the classification they're  
3 providing in their plan, and the way they're classifying the  
4 Deutsche Bank claims. Furthermore, Section 1122(a) prohibits  
5 the placing of claims in any class receiving dissimilar  
6 treatment to that class, and since these claims are general  
7 unsecured claims and are to be treated like and equal to  
8 general unsecured claims, they cannot be classified with claims  
9 that are not receiving treatment as general unsecured claims.  
10 Now, after the Boston Post Road decision of the Second Circuit  
11 and Judge Gonzalez's decision in Young Broadcasting, and  
12 there's a decision in the Western District, In re Appleridge  
13 Retirement Community, it's clear that the burden is on the  
14 debtor, not on the movant to show that the classification is  
15 wrong, but on the debtor to show that the classification is  
16 proper and appropriate.

17 So I think we now have to turn to the response that  
18 the debtors submitted to see whether they provided any  
19 justification for what we say is a misclassification. And I'm  
20 going to go through several sentences in the response,  
21 specifically. I'm referring, particularly, to page --

22 MR. MILLER: Your Honor, please. I'm not clear on  
23 what's happening here. Is this an objection to the  
24 classification under the plan, which is a confirmation  
25 objection, or is this a hearing as to the misclassification of

1 one particular claim?

2 THE COURT: It's a hearing on the classification of  
3 one particular claim, and we're not having a confirmation --

4 MR. KOLOD: That's correct, Your Honor.

5 THE COURT: -- objection at the moment.

6 MR. KOLOD: I'm not going there.

7 THE COURT: Whether or not it might be more  
8 appropriately lodged at the time of confirmation remains to be  
9 seen, and it's certainly in the back of my mind as I'm hearing  
10 this. So you may want to, at some point in your argument,  
11 comment as to why we're doing this now, as opposed to at the  
12 time of confirmation. But continue with your argument.

13 You were seeking to castigate certain things stated by  
14 the debtors in their papers, just as a reminder of where you  
15 were.

16 MR. KOLOD: Thank you, Your Honor. The reason -- I'll  
17 just go back. The reason we're raising this now is because of  
18 the voting issue, the November 4th voting deadline. We think  
19 this issue, if possible, should be resolved prior to the  
20 deadline for casting votes within various classes. That is the  
21 reason for the urgency.

22 THE COURT: Just so we're clear on something here  
23 about timing, I know you're substitute counsel for Bingham,  
24 which was the original law firm that brought the motion, and  
25 you weren't privy, as a result, to a conversation that took

1 place among counsel and the Court having to do with the  
2 scheduling of this particular motion, but I'll tell you, if you  
3 don't know it. There was a request made by your client to  
4 accelerate the timing of the hearing on this matter so that it  
5 would be heard on a date earlier than today's omnibus hearing  
6 date. That request was opposed by debtors' counsel. And  
7 during the course of the telephone conversation, I recall  
8 raising some concerns as to why Deutsche Bank waited until this  
9 point in the case to be bringing on a motion of this sort.  
10 Surely, there was actual knowledge of the classification  
11 question at around the time of the disclosure statement was  
12 being heard for approval. Yet Deutsche Bank, to the best of my  
13 recollection, did not make any objection at that time  
14 concerning classification. There were any number of other  
15 objections made at the time of the disclosure statement  
16 hearing, including one that I prominently recall made by the  
17 Centerbridge, having to do with the adequacy of disclosure.  
18 All of those objections were overruled and deemed to be  
19 confirmation objections.

20 So one of the clouds that you need to dispel here is  
21 why this is a today emergency for your client as opposed to a  
22 yesterday problem which should have been solved then, not now.  
23 That's question one. And there's another timing problem that  
24 we have. Why are we dealing with this today, as opposed to at  
25 the time of confirmation, since it seems to be, in effect, a

1 confirmation objection? But I don't want you to lose your  
2 place.

3 MR. KOLOD: Okay, but again, I want to point out that  
4 Deutsche Bank wants to support the plan and has agreed to  
5 support the plan, other than this issue. If this issue is  
6 resolved and Deutsche Bank is permitted to vote in the general  
7 unsecured class where it belongs, it will vote in favor. So  
8 let me thank you for reminding me of my place.

9 THE COURT: But what happens -- just, since you  
10 brought that up, let's just say for the sake of discussion that  
11 this is not resolved today. Is Deutsche Bank obliged, under  
12 the plan support agreement, to vote in support of the plan in  
13 its present class?

14 MR. KOLOD: That's an issue that we would have to  
15 address. I don't believe we've addressed that internally.

16 THE COURT: Okay, I've asked a controversial question.

17 MR. KOLOD: Now, Your Honor, turning to the response,  
18 and again, I'm looking particularly at pages 7 through 12 of  
19 the response, I think what we will see as to the debtors'  
20 position on these claims is that, number one, they do not  
21 believe there was any difference between an unsecured claim and  
22 a general unsecured claim. The whole premise of their argument  
23 is that those two phrases have exactly the same meaning, that  
24 the word "general" has no meaning whatsoever. And I'll  
25 demonstrate that in their response.

1           Secondly, it's clear from their response, and I think  
2           the factual discussion that they put in pages 7 through 12 is  
3           very candid and very honest. I don't think there's anything in  
4           the factual description that is in any way misleading about  
5           what happened. It makes the picture very clear. At the time  
6           that they drafted their initial plan, which was within a few  
7           months after Court approval of the settlement, there was no  
8           financial incentive to do anything other than classify the  
9           claims properly, to do it the right way. And I think the  
10          drafting and the plan classification at that point was  
11          extremely probative of what they understood the settlement to  
12          mean.

13          The third point is that their initial disclosure  
14          statement expressly stated that they had agreed that these were  
15          general unsecured claims, and that's why they were being  
16          classified in the class of general unsecured claims. That's in  
17          the disclosure statement.

18          Fourth, it's clear that when they got pressure from  
19          other creditors to rejigger the distributions, they classified  
20          the claims in classes which are inappropriate by the very  
21          definitions of those classes, and we'll look at the definitions  
22          of affiliated claims to see that.

23          And finally, in paragraph 29 of the response, we'll  
24          see that they state exactly what they're doing, what their  
25          position is. They're classifying the Deutsche Bank claims not

1 as general unsecured claims but as unsecured claims contrary to  
2 the terms of the settlement.

3 Your Honor, may I approach the bench?

4 THE COURT: Sure.

5 MR. KOLOD: We have excerpts from the two disclosure  
6 statements -- the initial and the first amended -- that list  
7 the classes. And I think this is important to the discussion.  
8 Now, in the response -- first, in page 8 of Lehman's response,  
9 paragraph 20, halfway through that paragraph, they have the  
10 sentence, "General unsecured claims against LBHI, likewise,  
11 were divided into twenty-three subclasses." All right? So  
12 they state in their response that in the initial plan, there  
13 were twenty-three subclasses of general unsecured claims. Now,  
14 if you look to pages 6, 7, 8, and 9 of the disclosure statement  
15 excerpt which I've handed up to the Court, you'll see the  
16 twenty-three classes; we've numbered them in the margins. They  
17 ignore the priority nontax claims, the secured claims, classes  
18 1 and 2, and the equity interest claims. And the remaining  
19 classes are the unsecured claims classes. And class 3 and  
20 class 5 are the senior unsecured claims class and the  
21 subordinated unsecured claims class. So it's clear that these  
22 twenty-three classes are all of the unsecured classes,  
23 including senior and subordinated classes. And the  
24 distributions for those classes range between zero and, I think  
25 at that time, 17.4 percent. So they're saying that each of

1 those classes is a general unsecured claim, which is not true.  
2 It's clear that those are unsecured claims, not general  
3 unsecured claims.

4 Now, if you look at paragraph 21 of the response, they  
5 quote from their own disclosure statement with respect to that  
6 initial plan, and they state, "The Lehman parties also agree  
7 that certain claims of Bankhaus with respect to other  
8 participations will be allowed as general unsecured claims  
9 against LCPI and LBHI." So they've said correctly what their  
10 obligation is.

11 Now, if you then move to page 10 of their response,  
12 paragraph 27, they now describe the first amendment to the  
13 plan. And in the very last line on that page, in paragraph 27,  
14 they say, "Similarly, general unsecured claims against LBHI  
15 were divided into fourteen subclasses." So they're saying that  
16 there are fourteen subclasses of general unsecured claims in  
17 the first amended plan. And again, if you look at our plan  
18 excerpt -- excuse me, our disclosure statement excerpt, pages  
19 5, 6, 7 and 8, once again, you will see the fourteen classes.  
20 They eliminate the first two, which are not unsecured classes,  
21 and the last, which is the equity class, and that leaves  
22 fourteen classes. And among those fourteen classes are senior  
23 unsecured claims, senior intercompany claims, senior affiliate  
24 guarantee claims, senior third-party guarantee claims, senior  
25 third-party LBT, LBSN guarantee claims. And then going to

1 classes 10A and 10B, subordinated class 10A claims,  
2 subordinated class 10B claims, subordinated class 10C claims,  
3 and then class 11 is Section 510(b) claims against LBH. And  
4 the recoveries for those various unsecured classes again ranged  
5 from zero to 21.4 percent.

6 So the debtors clearly are denying that there's any  
7 difference in meaning between unsecured and general unsecured  
8 claims. But otherwise, in their response, they never attempt  
9 to explain what that difference is or provide any definition or  
10 explanation for the meaning of general unsecured claims.

11 Now, the second point about the first amended plan,  
12 which is in their paragraph 27 on page 11 is that that was  
13 supported by the creditors' committee. Now, if you look at how  
14 they try to distinguish away their plan treatment, they say  
15 that at that point in the plan process, and this is in the last  
16 line of paragraph 20, the initial plan presented distinctions  
17 without a difference. So they're saying it didn't matter, so  
18 pay no attention to how we interpreted the settlement agreement  
19 immediately after it was entered into. But we take a different  
20 view of that. Essentially, what they're saying is that prior  
21 to their being put under pressure by other creditors classes,  
22 at a point in time immediately after the settlement was entered  
23 into and approved, they applied it as they understood it to be  
24 written and this is what their conclusion was: that the  
25 Deutsche Bank claims belonged in the classes of general

1 unsecured claims at LCPI and LBHI.

2 Now, let's address what happened, according to the  
3 response, how this changed and why it's changed. At the end of  
4 paragraph 27 of their response and the beginning of paragraph  
5 28, they explain that they came under pressure from creditors  
6 groups who wanted to file other plans, and they engaged in  
7 negotiations with them, and then they amended the plan to  
8 change the treatment of the Deutsche Bank plan. And in their  
9 disclosure statement, they explain the basis for that change in  
10 treatment. And this is quoted in paragraph 28 at page 11 of  
11 their response. The second sentence: "Since" --

12 MR. MILLER: Just so the record's clear, Your Honor,  
13 the word "pressure" doesn't appear in that paragraph  
14 whatsoever.

15 THE COURT: Okay.

16 MR. KOLOD: That's correct. It --

17 THE COURT: I think the record's clear. The document  
18 that appears in the ECF system says what it says.

19 MR. KOLOD: It speaks for itself.

20 THE COURT: And counsel is in the midst of his  
21 advocacy piece.

22 MR. KOLOD: Now, looking at the quoted language in  
23 their response from the second amended disclosure statement,  
24 they state, "Since such claims" -- referring to the two  
25 Deutsche Bank claims, "Since such claims are based on a

1 contractual obligation of LCPI to an affiliate, the debtors  
2 have included the allowed claim as a claim of an affiliate,"  
3 and then it goes on, "and the debtors have included the allowed  
4 guarantee claim" -- suddenly, the word "allowed guarantee  
5 claim" appears for the first time -- "the allowed guarantee  
6 claim against LBHI in LBHI class 4B as a senior affiliate  
7 guarantee claim." Now, there's nothing in here about they're  
8 treating them this way because they're general unsecured  
9 classes. What they're saying is they're ignoring the  
10 settlement, they're ignoring what it requires, and instead,  
11 they're looking behind the settlement at the original claims,  
12 what they say that the fact that they are based on contractual  
13 obligations of affiliates. And they're saying that justifies  
14 the classification as affiliate claims.

15 However, if you look at section 1.3 of their plan, the  
16 second amended plan, they define affiliate claims. And they  
17 define them as, in the case of LBHI, any claim asserted by an  
18 affiliate. And with respect to subsidiary debtors, any claim  
19 asserted by an affiliate of that subsidiary debtor. There's no  
20 reference to the origin of the claims or what the claim is  
21 based on. It's a question of who is asserting the claim.  
22 Deutsche Bank is not an affiliate, and Deutsche Bank is the  
23 party who is asserting these claims. They are not within the  
24 meaning of affiliate claims.

25 Now, with respect to their attempt to define the LBHI

1 claim as a guarantee claim, I would point out that the order of  
2 this Court which incorporated the settlement provided that that  
3 claim was allowed and accepted and was defined as a general  
4 unsecured claim and was defined as a security and collateral  
5 agreement claim. It wasn't defined as a guarantee claim, but a  
6 security and collateral agreement claim. And the transcript of  
7 the hearing, which we quote in the motion, explains why. That  
8 was the title of the agreement; it was not a guarantee. But  
9 there was litigation about that which was resolved by the  
10 settlement. And counsel at the hearing before Your Honor which  
11 is quoted in the transcript portion quoted in the motion stated  
12 that this settlement resolves the question of whether or not  
13 this is a guarantee by essentially sidestepping it and allowing  
14 the claim as a general unsecured claim. So there's no basis  
15 for their attempting to characterize it as a guarantee claim.

16 Now, finally, looking at page 29 of their response --  
17 excuse me, paragraph 29 of their response on page 12, they  
18 admit exactly what they're doing here. After the first  
19 sentence, they say they filed the current plan, and then they  
20 say "The Chapter 11 plan classifies the LCPI claim as an  
21 allowed and accepted nonpriority unsecured claim of an  
22 affiliate." The word "general" unsecured claim, the word  
23 "general" has vanished from their description of what they did.  
24 And they go on to say, "The LBHI claim is classified as an  
25 allowed and accepted nonpriority unsecured guarantee claim of

1 an affiliate." Again, the word "general" has vanished from  
2 their description of what they are trying to do or what they  
3 have done.

4 And then they go on to say that "These claims are  
5 provided the same treatment provided to other allowed and  
6 accepted nonpriority unsecured claims in the respective  
7 classes." Where did those words, "in the respective classes"  
8 come from? They are not in the settlement agreement and they  
9 are not in Your Honor's order. This is their attempt to  
10 rewrite and reinterpret the settlement agreement. Essentially  
11 what they've said is general has no meaning; we can pick any  
12 unsecured class that we can justify, and they didn't pick the  
13 right one because these are affiliate claims, and we can put  
14 them in that, and as long as we treat them the same as that  
15 class, that's all our obligation was. They don't have to get  
16 the treatment that other general unsecured claims get. That is  
17 simply wrong; it's contrary to the agreement.

18 Now, I think what they've done is essentially make the  
19 agreement evaporate. It doesn't exist. They simply made it  
20 vanish and done what they thought was expedient in terms of  
21 satisfying their other creditors.

22 Now, again, coming back to the question of burden,  
23 because they have the burden to justify what they did, what  
24 evidence have they presented that general unsecured claim has  
25 the same meaning as plain unsecured claims? Not a word. There

1 is nothing in their response that explains why unsecured claims  
2 and general unsecured claim have the same meaning and you can  
3 just ignore the word "general". Second, what evidence have  
4 they presented that the LCPI or the LBHI claims of Deutsche  
5 Bank are asserted by an affiliate, which is the definition of  
6 an affiliate claim? Not a bit of evidence. There is no --  
7 this is clearly contrary to the facts. These claims are not  
8 asserted by affiliates.

9 THE COURT: Can I stop you there? And really it's a  
10 point of clarification. My understanding is that Deutsche Bank  
11 acquired the Bankhaus claims pursuant to the acquisition  
12 agreement which is characterized in the debtors' paper. And in  
13 your reply, you say I shouldn't even pay attention to that  
14 because you view that as a distraction. But it's correct,  
15 isn't it, that Deutsche Bank acquired an affiliate claim, the  
16 claim of Bankhaus and stands in the same capacity as its  
17 assignor with respect to that claim. You can't improve your  
18 position just because Deutsche Bank is not an affiliate of the  
19 debtors.

20 MR. KOLOD: Well, Your Honor, I think --

21 THE COURT: So I don't understand your argument;  
22 that's my point.

23 MR. KOLOD: All right. I think the question has a  
24 slightly complicated answer, but I think it has a very clear  
25 answer. First of all, they defined their own classes. They

1 say, we can define our classes, and they define their classes.  
2 And what they say is that the class consists of claims asserted  
3 by the affiliates. Right? What that means to me is that if  
4 one of those affiliates acquired a claim from a third party  
5 against one of the debtors and asserted that claim, that claim  
6 would be subject to the same treatment in that class, and that  
7 once they transfer the claim and it is asserted by a different  
8 party, then it is no longer being asserted by an affiliate.

9 THE COURT: This is why they have too many lawyers in  
10 the room. It's an interesting argument.

11 MR. KOLOD: Well, I think, now, the next question is  
12 why are they treating this class differently than general  
13 unsecured claim? This is really the key point. They have to  
14 explain what the justification for the worse treatment is,  
15 because they are treating it worse than the general unsecured  
16 claim class. Once you understand why they think they can treat  
17 those claims worse, then you can decide whether the Deutsche  
18 Bank claims falls into that criteria or falls outside of it.  
19 They never bothered to explain the justification for the worse  
20 treatment, the lesser treatment. And so it is impossible to  
21 really get to the question of are these affiliate or not  
22 affiliate claims, other than to go by the definition that  
23 doesn't cover these claims.

24 So third point, what evidence have they presented that  
25 the LBHI claim is a guarantee claim? No evidence. They just

1 call it that, and that's contrary to the settlement agreement  
2 and it's contrary to what was stated in court on the  
3 transcript. It is not a guarantee agreement.

4 What evidence have they presented that the claims are  
5 being treated like and equal to general unsecured claim? No  
6 evidence whatsoever. They just ignore them. They say,  
7 essentially, they're being treated like unsecured claims, and  
8 that's all you're entitled to. You're entitled to equal  
9 treatment in whatever class of unsecured claims we drop you  
10 into.

11 So the response is completely devoid of any  
12 justification for what they're doing here. We cannot  
13 understand what they're doing, other than they're asserting the  
14 right to do whatever they see fit as long as they're treating  
15 this class of -- which is -- a class into which we don't  
16 belong -- as long as they're treating everyone in that class  
17 the same way.

18 Now, is it really true that the concept of a general  
19 unsecured claim has no meaning whatsoever, that it's exactly  
20 the same as an unsecured claim, and that no bankruptcy lawyer  
21 knows what a general unsecured claim is? I don't think that's  
22 correct. I think it's very clear what the understanding of  
23 general unsecured claims is in bankruptcy court. It's  
24 essentially the pool of unsecured claims after you remove  
25 claims that have unique rights or advantages or disadvantages

1 and risks, and either increase their value and entitle them to  
2 better treatment or decrease their value and entitle them to  
3 worse treatment. That's what the class of general unsecured  
4 claims means. And so what that means for drafting purposes is  
5 that if you look at how the class of general unsecured claims  
6 is defined in general practice, it's almost invariably a  
7 catchall class that includes either all claims or all unsecured  
8 claims. And then it takes out the claims that either get  
9 better treatment or worse treatment. And that is the standard  
10 drafting approach to general unsecured claim.

11 THE COURT: I hear what you're saying. Is that based  
12 upon some empirical evidence that you've collected?

13 MR. KOLOD: Well, yes, we have looked at dozens of  
14 plans, and every plan has its unique features, but I think  
15 that's the common theme.

16 THE COURT: So you're saying that the lowercase g  
17 general as used in the settlement agreement necessarily carries  
18 with it secondary meaning?

19 MR. KOLOD: It has a meaning. It is a phrase with  
20 meaning.

21 THE COURT: I'm using the term "secondary" meaning in  
22 a trademark sense, a word in which the common parlance of  
23 bankruptcy practitioners carries with it a special connotation,  
24 is that correct?

25 MR. KOLOD: That's correct, yes.

1 THE COURT: Okay.

2 MR. KOLOD: Now, so I said what I think the criteria  
3 is for the general unsecured claim. Let's look at how this  
4 debtor, or these debtors defined general unsecured claim,  
5 because the definition is set out in section 1.60 of the plan.  
6 And they do exactly what I said. "A general unsecured claim  
7 means, in the case of LBHI, any claim" -- any claim "other than  
8 administrative expense" -- and it goes up, "priority," better  
9 treatment, "priority nontax," better treatment, "secured," that  
10 has collateral, it's not an unsecured claim, "senior  
11 unsecured," better treatment, "senior affiliate," better  
12 treatment, "senior affiliate (sic)," better treatment, "senior  
13 third-party guarantee claimant", better treatment or worse, in  
14 this case it depends, "affiliate claim," worse treatment,  
15 "third party guarantee claim," worse treatment, "subordinated  
16 claim," worse treatment, "or a Section 510(b) claim," worse  
17 treatment. And then with respect to the subsidiary debtors,  
18 they say the same thing. Any claim -- any claims, it's the  
19 catchall -- "Any claim other than the administrative expense,  
20 priority, priority nontax, secured, or an affiliate claim,"  
21 because those are the classes that are either getting worse or  
22 better treatment than the general unsecured claims. And that  
23 is exactly what we would expect. That is the meaning in common  
24 parlance of general unsecured claim.

25 So it's clear that Lehman, in their second amended

1 plan, deliberately decided not to classify, to take us out of  
2 the general unsecured claim class, and classify us as  
3 disadvantaged unsecured claims of affiliates that are treated  
4 worse than general unsecured claims. And in this case, they're  
5 treated 100,000,000 dollars worse. But there's nothing in  
6 their response that explains or justifies that worse treatment.  
7 There's nothing about these claims, particularly after the  
8 settlement agreement and the court order that entitles them or  
9 should impose on them worse treatment than what they bargained  
10 for, which is treatment along with-- like and equal to the  
11 general unsecured claims. That treatment, either they have to  
12 justify that different treatment, or it's discriminatory and  
13 improper. Either the worse treatment has some justification,  
14 which we'd like to know what it is and why it applies to us, or  
15 those classes are simply not being classified as general  
16 unsecured claim classes; they're classified otherwise. But  
17 they can't have it both ways. They either have to explain it  
18 or they have to treat us as general un -- explain and justify  
19 it and defend treating us differently, or they have to treat us  
20 like general unsecured classes.

21 We've provided an explanation. I think it's a cogent,  
22 sensible, coherent explanation of what the settlement agreement  
23 means, what it plainly means on its face. One can live in this  
24 world without every term being a defined term. There is an  
25 English language that has meanings that we use in everyday

1 approach, and in fact, I was wondering how Mr. --

2 MR. MILLER: Miller's my name.

3 MR. KOLOD: I know that. I was wondering how debtors'  
4 counsel, Mr. Miller, was going to signify capital letters as he  
5 spoke because the whole argument turns on which words have  
6 capital letters and which ones don't. But anyway --

7 THE COURT: I'm not sure if that's true, because --  
8 and I'm not quibbling with you but making a comment -- the  
9 settlement agreement was fashioned long before there was a plan  
10 poised for confirmation and long before there was a negotiation  
11 that included creditors; apparently even your own client was  
12 sufficiently engaged in this process to execute a plan support  
13 agreement. So there's an awful lot going on in the plan  
14 formulation process that's behind the curtain and obscured from  
15 my personal view. But what I take to be the debtors' principal  
16 argument is that, sure, they entered into a settlement  
17 agreement with Bankhaus and did so in good faith but had a lot  
18 of flexibility as proponent of a plan. What you're saying, in  
19 effect, is that they didn't have flexibility, and that there  
20 was only one way that they could classify your claim properly,  
21 and that is a defined term, General Unsecured Claim, all  
22 capitalized letter.

23 MR. KOLOD: That's not quite what I said, Your Honor.

24 THE COURT: Okay, I've said what I've said. Now you  
25 can tell me why I'm wrong.

1 MR. KOLOD: What I'm saying is that there was an  
2 agreement that this claim would be treated like and equal to  
3 the general unsecured claims it has to each of the debtors and  
4 so one then had -- they are correct that we didn't get involved  
5 with classification in the sense that we didn't restrict their  
6 ability to create classes. They were free to create classes.

7 But what this settlement provided was at the end of  
8 the day, after they created all their classes, you would point  
9 to the class of the treatment of general unsecured claims and  
10 you would put this claim in it. That was the agreement that  
11 the parties reached, that we would be treated like and equal to  
12 other general unsecured claims. So then you do have to go  
13 through this identification process, and it might have been  
14 difficult, but it isn't difficult because the first two plans  
15 that they filed after the entered into this agreement made it  
16 very clear -- and the third plan still makes it very clear --  
17 which is the general unsecured class, which they happen to call  
18 it general unsecured, but they could have called it anything,  
19 and it still would be apparent that it is the general unsecured  
20 class. It's the catchall class from which you take out claims  
21 that are being treated better or worse.

22 So we did not restrict their ability to classify.  
23 What we did was get their agreement, or the administrator got  
24 their agreement as to how they would be treated after the dust  
25 settled when they created all these classes.

1 THE COURT: Now, let me just break in for one second  
2 and ask a clarifying question because you're using the pronoun  
3 "we" and then you clarified it to say "the administrator". The  
4 reality here is that Deutsche Bank bought into this after the  
5 fact, had no direct involvement in negotiation of the  
6 settlement agreement, and bought a claim -- bought two  
7 claims -- with the expectation that it would be treated like  
8 and equal to the treatment of general unsecured claims and  
9 presumably went through a process of internal evaluation of  
10 whether or not it was a good purchase and decided to do that.  
11 So you come here as an advocate for a claims acquirer that does  
12 what many parties did throughout this bankruptcy case, made a  
13 business judgment as to whether or not a particular acquisition  
14 of a claim was sensible at the time.

15 Now, you've been accused in the papers filed by the  
16 debtors of having a client who has buyer's remorse with respect  
17 to the claims acquired. And in your responsive papers, you  
18 said that's something that I should completely disregard; that  
19 has nothing to do with this. Correct?

20 MR. KOLOD: Correct. We would like you to enforce the  
21 terms of the settlement agreement as written and as approved by  
22 Your Honor.

23 THE COURT: Okay, but here's really my question. How  
24 do you know the truth of what you're asserting here, other than  
25 that of anybody who's looking at a distance, removed from the

1 actual negotiations, as to what the documents say and then  
2 fashioning a creative argument?

3 MR. KOLOD: I know that what I'm saying is correct  
4 because when we bought the claims from the administrator, he  
5 stated in writing that that was what it meant, number one.  
6 Number two, I know that my interpretation is correct because  
7 the debtors' first two plans, when they weren't under pressure,  
8 comported entirely with the settlement agreement and explained  
9 in the disclosure statements why, because that's what they had  
10 agreed to do. And I know what I'm saying is correct because  
11 the response provides no justification for what they're doing,  
12 no explanation, no compliance with the definition of affiliated  
13 class, no compliance with the definition of general unsecured  
14 claims. It's -- and it requires them, when they try to state  
15 the settlement agreement, it requires them to rewrite the  
16 settlement agreement in some way to show that they're complying  
17 with it, either by leaving out the word "general" or by adding  
18 the words, all they agreed was to put us in some unsecured  
19 class and treat is like people in that class. That's why I  
20 know this interpretation is the correct one. And I also know  
21 from years of practice as a bankruptcy lawyer what we mean when  
22 we talk about "GUCS", general unsecured claims. This is what  
23 we mean. So that's my answer, Your Honor.

24 THE COURT: All right.

25 MR. KOLOD: Now, in paragraph 34 of the response,

1 Lehman explains what it can't do, what they admit they can't  
2 do. And they say the settlement agreement evidences that the  
3 debtor agreed that the Bankhaus claims would not be singled out  
4 for unfavorable treatment. That's exactly what they're doing.  
5 They've singled us out for unfavorable treatment relative to  
6 general unsecured creditors. Plain and simple, that's what  
7 they've done.

8 Your Honor, I think it's clear that the response has  
9 failed to carry the burden that rests on the debtors to justify  
10 their treatment of these claims and that Deutsche Bank is  
11 entitled to the relief we seek in our motion and our wherefore  
12 clause. And I haven't gotten into whether the administrator's  
13 statements of intent are relevant or not, and I think I would  
14 like to save time in the reply to deal with questions that Mr.  
15 Miller may raise in an attempt to resuscitate his argument.

16 Thank you very much.

17 THE COURT: Okay, before you sit down and before I  
18 hear from Mr. Miller, I raised some concerns early in your  
19 argument about timing, which you really haven't addressed, and  
20 it's a difficult series of questions because it goes to why  
21 this is being pressed now, at this hearing, in October, as  
22 opposed to earlier, and why it's being pressed now, as opposed  
23 to later, at the time of confirmation.

24 MR. KOLOD: Your Honor, it clearly can -- the same  
25 issues can be raised at confirmation. I don't think there's

1 any question about that. I simply am not in a position because  
2 of my recent involvement in this, to -- maybe I can get an  
3 answer, but I just don't know the answer to why -- or what was  
4 raised previously, so I can't answer that part of the question.

5 I can say that the reason we asked Your Honor to  
6 decide it now is because of the voting deadline. Your Honor is  
7 free to determine whether that is a sufficient and valid  
8 reason. That is the reason. We would like to be able to vote  
9 these claims in favor of the plan in the appropriate classes.  
10 So that's the reason. Thank you.

11 THE COURT: Okay. I understand. Thank you.

12 MR. MILLER: Harvey Miller for the debtors. If Your  
13 Honor please, I would like to put this motion into context with  
14 all due deference to substitute counsel. But when this motion  
15 was made, Your Honor, it was in the nature of a summary  
16 judgment motion. The motion was that if you just take the  
17 settlement agreement, and you look at the settlement agreement  
18 without anything else, you'd have to come to the conclusion the  
19 classification is wrong. Now the argument has switched. The  
20 argument has switched in with the kind of statements that there  
21 is a burden on the debtors -- no burden on the moving party.  
22 Now, when you talk about burden, Your Honor, Your Honor  
23 pinpointed it: they weren't there in negotiations in December  
24 of 2009. It was the administrator that was there. It was the  
25 debtors that were there. And there is nothing in connection

1 with this motion, any statement by the administrator as to what  
2 occurred in connection with this settlement agreement. The  
3 administrator is noisily absent in these proceedings, Your  
4 Honor.

5 Now, going to the statement that there is a universal  
6 definition of general unsecured creditors, I've been practicing  
7 in this field, Your Honor, for fifty-two years. I even  
8 remember the Act of 1898.

9 THE COURT: I think you get the award for the longest-  
10 running career in the room.

11 MR. MILLER: I'm not finished yet. I'm not finished.  
12 The term general unsecured creditor simply means a nonpriority  
13 unsecured creditor. It has no secondary meaning. Now, in  
14 terms of what Your Honor pointed out, Deutsche Bank acquired a  
15 claim. It purchased a claim, and where is Mr. -- Deutsche  
16 Bank's proof that when this settlement agreement was  
17 negotiated, it was unequivocally agreed that they would get the  
18 highest recovery of a general unsecured creditor, that the  
19 debtors could not classify -- that the debtors could not  
20 classify on the basis of affiliate and guarantee claims?  
21 There's nothing in this agreement that even talks about that.  
22 There are no restrictions in the agreement on the debtors'  
23 right to classify. The essence of the argument that's being  
24 made, Your Honor, is that all general unsecured creditors have  
25 to be in the same class, that you can't classify general

1 unsecured creditors into different classes. And I respectfully  
2 submit, Your Honor, that is not the law in this circuit, and  
3 hasn't been the law in this circuit for a long, long time,  
4 going all the way back to the First National Bank of Herkimer  
5 v. Poland and has been accepted in this circuit without any  
6 question.

7 So what do we have to do, Your Honor? Let's look at  
8 what happened in this case. Deutsche Bank, as a sophisticated  
9 creditor, a sophisticated entity, an institution, decided to  
10 purchase these claims, and obviously, Your Honor, there was a  
11 pricing issue. How much are they going to pay Bankhaus, the  
12 administrator, to purchase these claims? And in that equation,  
13 in that calculation, the question is what's going to happen to  
14 this claim? How is this claim going to be treated in the  
15 Chapter 11 cases? So you have to look at, Your Honor, the  
16 assignment agreements and see what the assignment agreements  
17 and significant provisions in the assignment agreements  
18 provide. And one of the significant provisions, Your Honor --  
19 just give me a moment -- in section 8.2 of the assignment  
20 agreement which says -- and again, I love the comment, "For the  
21 avoidance of doubt, purchaser, Deutsche Bank, acknowledges that  
22 it bears the risk subject only to the insolvency  
23 administrator's express representations and undertakings made  
24 in the assignment agreement, that the claims may be affected by  
25 a plan of reorganization," -- what's the significance of that

1 phrase, Your Honor? That the plan of reorganization may  
2 classify, may treat unsecured creditors differently in  
3 different classes, and any stuff from the consolidation of the  
4 debtors, "and/or any other treatment imposed in the context of  
5 the U.S. proceedings." Well, counsel points out that you must  
6 give effect to every word of every agreement. What is the  
7 effect of these words? That there could be a plan of  
8 reorganization that treated these claims in separate classes,  
9 provided different treatment in separate classes, as long as  
10 the treatment within the class was equal among those  
11 participants in the class.

12 Then, Your Honor, the issue of the status of these  
13 claims must have been significant because in section 8.3, the  
14 insolvency administrator acknowledges and confirms that his  
15 intention and understanding of the status and treatment of the  
16 claims in entering into the settlement agreement were that (and  
17 his understanding of the debtors' intentions and understandings  
18 in entering into the settlement agreement was that), one, the  
19 LCPI claim will be classified and treated as an allowed and  
20 accepted general unsecured creditor," lower case, equal to all  
21 other general unsecured creditors against LCPI and a similar  
22 provision for the LBHI claim. After these acknowledgements and  
23 representations, then there's another paragraph in 8.3, and it  
24 says for the avoidance of doubt, again, "The insolvency  
25 administrator shall not be liable if his understanding of the

1 status and the treatment of the claims, and in particular the  
2 insolvency administrator's understanding of the debtors'  
3 intentions and understandings was incorrect." So on the right  
4 hand, they got an acknowledgement and confirmation from the  
5 insolvency administrator of what his intentions were and what  
6 he thought the intentions of the debtors were, and then on the  
7 left hand was a disagreement. They took it away. So there is  
8 no acknowledgement and representation because he's not assuming  
9 any personal liability. Those are very significant provisions.

10 Then, the insolvency -- and then 8.4, there's a  
11 provision that the insolvency administrator unconditionally and  
12 irrevocably covenants and undertakes (ii) upon a reasonable  
13 request of the purchaser to use its reasonable endeavors to  
14 assist the purchaser" -- Deutsche Bank -- "in defending any  
15 attempts by the debtors, the bankruptcy court, or any third  
16 parties to characterize or treat the claims in a manner which  
17 is contrary to the administrator's intentions as defined above  
18 or the settlement order. Well, where is the administrator?  
19 He's not here, Your Honor. He's not involved in this  
20 proceeding at all. And what is the significance of those  
21 provisions? There was an issue as to what would be the status  
22 of these claims. It was a significant issue, because when you  
23 look at the assignment agreement, and Your Honor may recall,  
24 Centerbridge filed an objection to the disclosure statement.  
25 They attached to the objection a copy, an unexecuted copy of

1 the assignment agreement. That unexecuted copy of the  
2 assignment agreement doesn't include section 8.4(ii) which I  
3 just read to the Court, which imposed an obligation on the  
4 administrator to defend these claims should there be  
5 proceedings in this court. Apparently they didn't ask the  
6 insolvency administrator to attend this hearing.

7 Then, Your Honor, think about it in the context.  
8 They're having this very strenuous negotiation. Pricing is  
9 very important to traders -- how much am I going to pay for  
10 these claims? And, they ask the administrator to confirm what  
11 are the intentions of the debtor. This is not a case, Your  
12 Honor, where there's a dead debtor -- there was nobody to talk  
13 to. They could have picked up the telephone and called the  
14 debtor -- what were the intentions of this agreement? That did  
15 not happen.

16 The reasons why it did not happen? We can all  
17 speculate, Your Honor, but it is clear from all the documents  
18 that there was an existing question as what would be the  
19 status, the classification, and the treatment under any plan of  
20 reorganization that might be proposed in this case in respect  
21 to these claims. And it had to go into the pricing issues.

22 So --

23 THE COURT: Mr. Miller, I hear all that you're saying  
24 about the pricing issue, and I even asked a question earlier  
25 that suggested some sensitivity to that point. But it's not

1 clear to me that that's terribly relevant in as much as the  
2 real question becomes how properly should the settlement  
3 agreement be interpreted and how much flexibility does the  
4 debtor have, and in reference to that I have a question that  
5 you can either answer now or sometime during your remarks.  
6 Does the debtor take the position that the settlement agreement  
7 is clear and unambiguous on its face as to what it means in  
8 terms of the treatment of the administrator's claim, or is it  
9 the debtors' position that it is a subject worthy of the taking  
10 of evidence on the basis of ambiguity as to what the document  
11 says on its face that would lead to a further hearing, perhaps  
12 with testimony, by those parties who actually negotiated the  
13 language of the settlement agreement?

14 MR. MILLER: My first position, Your Honor, is that  
15 the document is clear and unambiguous. It did not limit the  
16 debtors in any respect in terms of classification; there's  
17 nothing in the agreement that does that. There's nothing in  
18 the agreement that says that the claim of Bankhaus -- now it's  
19 Bankhaus before we get to Deutsche Bank -- that the claim of  
20 Bankhaus will get the highest recovery of any general unsecured  
21 creditor class under the plan. There is nothing in that  
22 agreement that says that. If we're just going to look at the  
23 four corners of the agreement, there are no restrictions. It  
24 could have been very easy, Your Honor, to have written in a  
25 clause that said under any circumstances, the recovery on the

1 Bankhaus claims must be equal to the highest recovery of any  
2 general unsecured creditor. It doesn't say that. There is  
3 nothing in this agreement.

4 I wasn't there, Your Honor; I don't know what was  
5 negotiated there. I know what the agreement says, and the  
6 original motion that was filed here -- the prime motion --  
7 said, just look at the agreement, the four corners of the  
8 agreement, and that's what we were looking at.

9 Now, substitute counsel says we have a burden of  
10 proof. It's not our motion, Your Honor. So my first position,  
11 Your Honor, is that the agreement is clear and unambiguous in  
12 favor of the debtors. There was nothing in this agreement that  
13 specified that Bankhaus -- not Deutsche Bank -- that Bankhaus  
14 was going to get the highest recovery of any class of general  
15 unsecured creditors. It's not in the agreement. There's  
16 nothing in the agreement that prohibited or limited the ability  
17 of the debtor to classify creditors by appropriate  
18 justifications for different classifications.

19 And there are many plans, Your Honor, in which  
20 affiliate claims are classified separately. And the fact that  
21 Deutsche Bank bought the claims -- as you pointed out, Your  
22 Honor, they took a business risk. They say in the  
23 agreements -- they're sophisticated, they bear all the risk.  
24 It doesn't change the basic nature and character of the claim.

25 So, on my first position, Your Honor, the agreement is

1 clear and unambiguous. The debtors have this flexibility.  
2 Remember, this was December 2009. The case was young -- maybe  
3 not thriving, but it was young. Nobody knew what the  
4 classifications ought to be. Even the first plan, as Your  
5 Honor may recall -- I think Your Honor referred to it as a  
6 placeholder. It was just a plan that was filed to try and get  
7 another sixty days of exclusivity. Even the second amended  
8 plan -- I mean, the first amended plan -- in January of 2011 --  
9 all the negotiations were were with the creditors committee.  
10 Counsel keeps referring to pressure from other creditors. We  
11 didn't say there was pressure; we just said there were  
12 negotiations with other creditors, which is what you're  
13 supposed to do in Chapter 11.

14 So, yes, I believe, Your Honor, that the agreement --  
15 the settlement agreement is clear and unambiguous in terms of  
16 the primary issue here -- is Deutsche Bank as an assignee of  
17 Bankhaus entitled to the highest recovery of any class of  
18 unsecured creditors? And I would submit to Your Honor, the  
19 settlement agreement doesn't provide for that.

20 And then, certainly, Your Honor, if Your Honor finds  
21 there are ambiguities, maybe an evidentiary hearing is  
22 appropriate. In terms of voting on the plan, Your Honor, the  
23 way we construed the PSA, the Plan Support Agreement, Deutsche  
24 Bank is obligated to vote in favor of the plan, and the  
25 debtors, Your Honor, are not concerned about whether the LCPI

1 plan is in whatever class -- whatever class. We believe the  
2 plan will be accepted either way and that Deutsche Bank is  
3 obligated to vote in favor of the plan. So I don't think  
4 that's a big issue, Your Honor.

5 And I believe, Your Honor, we have to look at the  
6 ancillary documents, the documents under which they bought  
7 these claims. The fact that there was an issue in their mind,  
8 and in the mind of -- certainly it was in their mind, and they  
9 compelled the administrator to make that acknowledgement and  
10 confirmation. And then he got weak-kneed about it and said no,  
11 no, I'll make the acknowledgement and confirmation, but I don't  
12 want any personal liability if it turns out to be incorrect.

13 So, I have to say, Your Honor, I think the agreement  
14 is clear and unambiguous in terms of no restrictions on the  
15 debtor in terms of classification. And, again, Your Honor,  
16 it's Deutsche Bank's burden to establish to Your Honor that  
17 they have a good case, and I don't believe they have, Your  
18 Honor. They're a sophisticated investor. They assume the  
19 risk. They say that they examine the documents. They  
20 consulted with attorneys. Even at the very last minute, they  
21 changed the form of the assignment agreement. The purchaser,  
22 Deutsche Bank, put in this provision that you, Mr.  
23 Administrator, if we request it, you have to come in and defend  
24 our claims. The administrator's not here, Your Honor. There's  
25 nothing from the administrator as to what happened.

1           So, on the basis of the agreement, we have to  
2       conclude, Your Honor, that there were no restrictions on the  
3       debtors. And what the debtors are doing are complying exactly  
4       with the settlement agreement. Deutsche Bank as the assignee  
5       of Bankhaus is getting the exact same treatment of everybody in  
6       that class, both as to the LCPI claim and as to the LBHI claim.

7           And I'm a little mystified by counsel's reference  
8       to -- there's no -- we haven't proved there was a guarantee  
9       claim? Well, Bankhaus took the position there was a guarantee.  
10      There was a guarantee document; the question as to whether it  
11      was authorized or not was resolved in the settlement agreement.  
12      But it's a guarantee claim. They bought the guarantee claim,  
13      and our pleading, Your Honor, tracks the language of the  
14      settlement agreement exactly -- what they got was an allowed  
15      and accepted non-priority unsecured claim. And there is no  
16      defined term in the agreement: general unsecured claim means a  
17      claim that gets the highest recovery under the plan. And I  
18      submit to Your Honor that's fatal to Deutsche Bank's position  
19      in this case.

20           So, I say to Your Honor, the agreement is unambiguous  
21      in favor of the debtors. There hasn't been any proof -- there  
22      hasn't even been an affidavit by the administrator, to the  
23      contrary, and he was the person that was there. So they have  
24      totally failed in proof, Your Honor, and with all due respect,  
25      the motion should be denied.

1 THE COURT: Okay. Thank you. Any further comment on  
2 this?

3 MR. KOLOD: Yes, thank you, Your Honor.

4 First of all, Mr. Miller and the response, repeatedly  
5 insist that Deutsche Bank is seeking treatment as the  
6 highest -- the treatment afforded the highest unsecured claim.  
7 And I would point out that that treatment is provided to the  
8 senior unsecured claims in the LBI and LCPI class. We've never  
9 asked for treatment as the highest unsecured claim -- that's a  
10 complete misrepresentation of our position. But it's the  
11 position that Mr. Miller is forced into because he refuses to  
12 acknowledge the difference between an unsecured claim and a  
13 general unsecured claim.

14 And I'd also point out that Mr. Miller, you know, in  
15 his fifty plus years of practice didn't say that as far as he  
16 is concerned, senior claims -- senior unsecured claims and  
17 subordinated unsecured claims are also just general unsecured  
18 claims. And that's the position that they have to take and  
19 have taken in their papers in order to make their argument.

20 With respect to the administrator -- and I think I  
21 agree with Mr. Miller that our initial position is that the  
22 agreement is unambiguous and further, that the burden was on  
23 them to show that they complied with the agreement in their  
24 classification. And I don't think they did that as I went on  
25 at great length about -- I don't think they did that in any

1 respect. But if there are any issues, those issues are what  
2 does general unsecured claim mean, which classes or which  
3 class, is a general unsecured claim class, and, as I said, I  
4 think they had the burden of proof on that.

5 But we did put in evidence in the form of the  
6 statements by the administrator as to what his understanding  
7 was that it didn't include affiliated claims. He was not  
8 negotiating for treatment as an affiliated claim or an insider  
9 claim, which is common, and the debtors didn't -- you know, as  
10 Mr. Miller said, it's very common to treat affiliated or  
11 insider claims differently in a plan or at least to separately  
12 classify them for voting purposes. Why didn't Mr. Miller's  
13 client negotiate for that provision? Why is the burden on the  
14 administrator who negotiated for treatment as a general  
15 unsecured claim? Why is the burden on him to say, but not as  
16 some other claim that's not general unsecured as opposed to  
17 their having said, no, you cannot be treated as a general  
18 unsecured claim, you are an affiliate claim and that is how you  
19 are going to be treated. So I think that argument really cuts  
20 the other way.

21 Now, with respect to the -- again, while I'll call  
22 them representations but they're technically not  
23 representations, they're statements of understanding. The  
24 administrator's representations to Deutsche Bank were, this is  
25 my understanding of what we negotiated. It's not what the

1 agreement says -- he wasn't saying, this is what the agreement  
2 says. He's saying, this is my understanding, so if there is  
3 any ambiguity about the agreement, I will testify that this is  
4 my understanding that would resolve that ambiguity. And he's  
5 also saying that I believe that the debtors have the same  
6 understanding. And, now, he's a witness -- if he's called,  
7 he's a witness. And if there is an evidentiary hearing, he  
8 will be called and he will cooperate. He's saying that this is  
9 what I would testify as a witness, and I don't want to have  
10 personal --

11 MR. MILLER: With all due respect, that's not what  
12 he's saying.

13 MR. KOLOD: He covenanted that he would hear and  
14 cooperate.

15 MR. MILLER: Counselor's testifying.

16 THE COURT: We're not -- at this point, this is just  
17 argument, and I'm not accepting any statement of counsel as to  
18 what Dr. Frege or his representatives will be saying if called  
19 as a witness and subjected to withering cross examination.

20 MR. KOLOD: And I'm not making -- all I'm doing is  
21 summarizing the agreement that Mr. Miller is making such a big  
22 deal about. What I'm saying is, he says --

23 THE COURT: Actually, you're both making a big deal  
24 about it, and you're the first one to make a big deal about it  
25 in your opening statements. You're saying that there are

1 handcuffs on the debtor as a result of this agreement.

2 MR. KOLOD: No, no, just --

3 THE COURT: Yes, you are. You're saying that this  
4 agreement limits the ability of the debtor to classify the  
5 claims acquired by Deutsche Bank and the administrator because  
6 those claims have to be given treatment that is like and equal  
7 to the treatment of general unsecured claims. That's your  
8 argument in a nutshell, correct?

9 MR. KOLOD: Yeah, it is correct. That is correct.  
10 Right -- what I mean by not handcuff -- it doesn't handcuff  
11 their ability to create classes. It does handcuff their  
12 ability to treat us --

13 THE COURT: It handcuffs their ability to treat the  
14 Deutsche Bank claim in a way that is less favorable --

15 MR. KOLOD: Correct.

16 THE COURT: -- than general unsecured claims as a  
17 defined term in the plan.

18 MR. KOLOD: -- than general unsecured claims which  
19 happens to be the defined class of general unsecured claims,  
20 that's -- that's our position. Yes, absolutely.

21 Now, you know, if the agreement is ambiguous on the  
22 meaning of general unsecured claims, we think that that cuts  
23 against the debtor because they have the burden here, and they  
24 presented no evidence. They quibble, they, you know --  
25 frankly, Deutsche Bank's reading of the agreement six months

1 later, the settlement agreement, and what it interpreted at, is  
2 irrelevant.

3 But there's nothing in that assignment agreement that  
4 states how they interpreted it. What they were doing was  
5 protecting themselves against reneging, and the way they  
6 protected themselves against reneging was not getting a  
7 restatement of what the agreement meant but getting a statement  
8 of the intention of the party who negotiated it, who they're  
9 acquiring it from, and his understanding of the other side's  
10 understanding of the agreement, and his agreement that he would  
11 cooperate and testify to that effect.

12 Now, yes, he's -- he said I don't want to be  
13 personally liable, but why should any witness be personally  
14 liable? He's going to be under oath, and he's going to testify  
15 under pain of perjury. So, he doesn't need to have personal  
16 liability if it turns out that Your Honor doesn't agree with a  
17 position.

18 So there's nothing surprising about that.

19 THE COURT: Well, this is the unexpressed subjective  
20 intent of a foreign administrator concerning his understanding  
21 of how a plan under U.S. law might treat his claim. I'm not  
22 sure what that means.

23 MR. KOLOD: Your Honor, I think that's probably --  
24 that may well be correct. All I'm saying is, that if there is  
25 a question of ambiguity then one has to look for other

1 evidence. And I think the kinds of evidence that one would  
2 look for is the common usage of the term general unsecured in  
3 bankruptcy practice. You'd get expert testimony on that point;  
4 you might try to find out whether Lehman and the administrator  
5 do have admissible evidence on the question of intent -- they  
6 may or may not. We would have to take discovery to find that  
7 out. And then you'd have to have testimony as to which class  
8 or in each debtors' case, is the general unsecured class.  
9 Those would all be the types of evidence that would come up in  
10 the -- if there were a hearing on any disputed facts. We're  
11 not saying there needs to be because we think they've  
12 completely failed to justify what they've done. It's  
13 inconsistent with the agreement, and the way Mr. Miller  
14 repeatedly described it, it's just -- they've just disregarded  
15 what that agreement says. They've just eliminated that entire  
16 paragraph -- that Paragraph 12K. And they've gone about  
17 treating these as unsecured affiliated claims even though  
18 they're not affiliated claims, or at best -- you don't have to  
19 decide this, I think there's a very good argument that they are  
20 not affiliated claims within the definition, and they would not  
21 be affected, for example, by substantive consolidation. That  
22 if Bankhaus and LCPI were -- or the other debtors were  
23 substantively consolidated, that would have no effect on that  
24 claim that was previously transferred.

25 But this is all for another day. My only point is

1 that they didn't deal with any of these issues in a way that  
2 would explain why they're putting us in a class that's getting  
3 lousier treatment than their contract on its face provides for.  
4 So, again, I think, Your Honor, that the assignment agreement  
5 is really a sideshow; it isn't relevant. What the  
6 administrator might testify is relevant, and I would also note  
7 that nowhere in their response, is there any statement as to  
8 what their witnesses would testify about intent. They are not  
9 disputing the correctness of those statements in the assignment  
10 agreement about intent. They are not providing a different  
11 statement of intent; Mr. Miller disclaimed any personal  
12 knowledge of intent. The debtors have completely avoided the  
13 question of what they thought the intent of the agreement is,  
14 so they failed to present any evidence on that. They haven't  
15 created an issue of fact on that.

16 So, again, I don't -- I think there's no need for a  
17 hearing, but again, Your Honor is the one who will decide  
18 whether there is an ambiguity, whether there is a need for  
19 testimony, and I've pointed out the issues on which we would  
20 want to present testimony if Your Honor goes that way. So,  
21 thank you, Your Honor.

22 THE COURT: Okay.

23 MR. MILLER: I just want to make -- I just have a  
24 point. I just want to clarify one thing so it's clear to  
25 counsel.

1 I unequivocally make the statement that all of the  
2 unsecured claims listed in the third amended claim are all  
3 general unsecured claims, notwithstanding titles of affiliate  
4 claims whatsoever. General unsecured claims is not a  
5 universally defined term. That's the opposition.

6 Second, Your Honor, Mr. Kolod said we have to show  
7 justification for what we did? Not at this hearing, Your  
8 Honor. We have the right to classify, and we classify that we  
9 believe the classifications are appropriate. He just made a  
10 statement that under the settlement agreement they can even be  
11 affected by substantive consolidation. Yet, Your Honor, if you  
12 look at the settlement agreement -- I think it's in 8.4 -- it  
13 specifically says substantive consolidation can affect those  
14 claims. You can't change the basis of this claim that it's the  
15 Bankhaus claims, it's not the Deutsche Bank claim.

16 And, again, Your Honor, their position when they made  
17 this motion was that the document is unambiguous. Intent is  
18 irrelevant if you're looking at the agreement and the words of  
19 the agreement, and under the words of the agreement, Your  
20 Honor, there were no restrictions on the debtors. And there  
21 was no requirement of a particular type of recovery other than  
22 it be in the class of general unsecured claims.

23 THE COURT: Okay. Thank you.

24 MR. KOLOD: Just one clarification -- just  
25 very brief --

1 THE COURT: It's almost 11:30 --

2 MR. KOLOD: I'm sorry.

3 THE COURT: -- and we're still on Item 3.

4 MR. KOLOD: With respect to substantive consolidation,  
5 the settlement agreement does say that if the guarantor -- what  
6 they call the guarantor -- if Lehman Holdings and LCPI are  
7 consolidated, that they reserve the right to say that there is  
8 no LCPI -- there's only a single claim instead of two claims.  
9 Okay? That is in the agreement. But if the obligor and the  
10 obligee -- you know, if Bankhaus and LCPI are consolidated, the  
11 obligor and the obligee and the claim has previously been  
12 transferred -- sold to a third party under well-established  
13 case law -- that would not affect whether the claim  
14 disappeared.

15 Obviously, if you merge two companies, then claims  
16 between them disappear because there's no one to pay. But if  
17 the claims have been sold out, and so that -- I just want to  
18 point out that the settlement agreement does not reserve that  
19 right. It doesn't subject the administrator to that risk. It  
20 only deals with the parent/subsidiary issue. Thank you.

21 THE COURT: All right. There are a number of parties  
22 who joined in the position of Deutsche Bank. The debtors filed  
23 a response indicating that the joinders, as that term was  
24 defined in their papers, didn't really have a standing to  
25 appear and be heard. I think I've heard enough on the subject;

1 I don't want to make a determination on standing, but I'm  
2 asking just in the interests of giving everybody an opportunity  
3 to say they don't need to speak. If it's true that parties who  
4 joined in the papers are prepared to rest on the position  
5 expressed by Deutsche Bank's counsel -- if there is some urgent  
6 need to say something, I can then deal with the standing issue.

7 Fine. Since I've heard no comment, I will rely upon  
8 the papers that have been filed in reference to the joinders  
9 and I'm going to take a ten-minute break. There are multiple  
10 reasons for that, but I don't have to express why.

11 (Recess from 11:31 a.m. to 11:45 a.m.)

12 THE COURT: Be seated, please.

13 It was a very interesting argument. The key to this  
14 dispute is a document that in Paragraph 12K both parties claim  
15 to be plain and unambiguous. I don't know if that's true or  
16 not. The treatment of general unsecured claims as provided  
17 under a settlement agreement entered into before the first plan  
18 has been formulated, is almost by definition a hypothetical  
19 exercise.

20 I believe that one side, Deutsche Bank, here takes the  
21 position that the term general unsecured claims, carries with  
22 it a secondary meaning that is generally understood by  
23 bankruptcy practitioners in the United States who engage in  
24 Chapter 11 practice. And, at least, the debtor takes the  
25 position that that's true only up to a point -- it's just

1 English -- and that the debtor has completed and unfettered  
2 flexibility to formulate plan treatment in its discretion.

3 I don't need to decide this question today, and I'm  
4 not going to. I believe that the issues raised by Deutsche  
5 Bank in its motion amount to a preemptive confirmation  
6 objection. And, so, I'm going to deny today's motion without  
7 prejudice to Deutsche Bank's right to ask the very same issue  
8 at confirmation and to challenge its treatment as holder of the  
9 acquired Bankhaus claims.

10 I'm not determining now whether or not the language is  
11 or is not unambiguous, but it does seem to me that if the  
12 parties wish to more effectively present their position at the  
13 time of confirmation, they may want to at least consider  
14 delving more deeply into what the parties actually meant when  
15 they wrote the words that they wrote at the time that they  
16 wrote those words.

17 As far as the voting process that we're now engaged  
18 in, I treat the representations of counsel as accurate, namely  
19 that Deutsche Bank has executed a plan support agreement which  
20 carved out the issue which we have been confronting today and  
21 that the issue as to whether or not voting is required despite  
22 issues concerning classification represents a matter that is  
23 subject to further review. I don't believe, given the  
24 circumstances, that there is any pressing need for me to decide  
25 the question today. Deutsche Bank will either cast its vote in

1 support of the plan because it's required to do so, or it will  
2 not cast its vote in support of the plan and expose itself to  
3 potential liability for not doing so. That's not my problem.

4 And as far as the plan process is concerned, while the  
5 claims are certainly significant in amount, in the context of  
6 the claim that we have in this case, it will not, based upon  
7 the representations of Mr. Miller, tilt the balance one way or  
8 the other. For that reason, this is something I do not need to  
9 decide today, and I am not deciding today except to deny the  
10 motion without prejudice.

11 MR. MILLER: Thank you, Your Honor.

12 MR. KOLOD: Thank you.

13 MR. MILLER: We're up to Item 4, Your Honor, on the  
14 agenda.

15 MR. BERNSTEIN: Good morning, Your Honor. Mark  
16 Bernstein from Weil, Gotshal on behalf of Lehman Chapter 11  
17 debtors. The next item on the agenda is a motion to terminate  
18 the Spruce securitization. Spruce CCS, LTD., is a special  
19 purpose vehicle that was formed to hold participations and  
20 commercial loans. Spruce has two current classes of  
21 outstanding notes -- one class of mezzanine notes which is held  
22 by LBHI, one class of subordinated notes which is held by LCPI.

23 Based on the debtors' projections, they expect that  
24 certain of these loans -- the underlying loans -- will be  
25 repaid in the near future in sufficient amounts to enable

1 Spruce to repay the mezzanine notes in full, leaving only the  
2 subordinated notes outstanding. When that happens, LCPI will  
3 seek to terminate the securitization documents and the  
4 securitization in full, to enable it to efficiently manage the  
5 loans and maximize the value of the loans without certain  
6 restrictions or limitations included in the securitization  
7 documents.

8 The debtors have submitted a declaration of David  
9 Walsh of Alvarez & Marsal in support of the fact that it will  
10 enable the debtors to maximize the value by terminating the  
11 securitization.

12 One response was filed to this motion by Centerbridge  
13 seeking certain reservations of rights. As Your Honor may  
14 remember, LBHI purchased these mezzanine notes from Bankhaus in  
15 a prior transaction in April of this year. And in the order  
16 approving that purchase, LCPI reserved its rights to assert  
17 that a corporate opportunity for it to purchase the notes was  
18 usurped by LBHI. Centerbridge just wanted to make sure that  
19 nothing in this order had any effect or impact on that  
20 reservation of rights and it doesn't as these notes are being  
21 repaid in accordance with the terms of securitization.

22 So, we have agreed with Centerbridge to add certain  
23 language to the order to make that fact clear, which says just  
24 that -- that this order shall have no impact on the reservation  
25 of rights set forth in the fourth decretal paragraph of the

1 order that approved the Bankhaus purchase. Inclusion of that  
2 language has resolved the Centerbridge objection and as a  
3 result, this actually is going forward uncontested today.

4 I'll be happy to answer any questions Your Honor has.  
5 If not, we respectfully request Your Honor grant the motion to  
6 terminate the Spruce securitization.

7 THE COURT: I'll grant the motion, but I'd like to  
8 just have it confirmed by counsel for Centerbridge whom I see  
9 sitting in the front row, that the form of order that has been  
10 crafted is satisfactory and resolves the objection.

11 MR. DUBLIN: It's still good morning -- good morning,  
12 Your Honor. Phil Dublin, Aakim Gump, on behalf of Centerbridge  
13 and the inclusion of this language does resolve our issues.  
14 Thank you.

15 THE COURT: Fine. Okay. It's approved.

16 MR. BERNSTEIN: Thank you, Your Honor. The next  
17 motion is a motion filed by Dechert so I'll turn the podium  
18 over to someone from Dechert to handle it.

19 MR. WASSERMAN: May it please the Court, my name is  
20 Adam Wasserman of Dechert for the current and former outside  
21 directors of LBHI and --

22 THE COURT: Do we need tech support for the  
23 microphone?

24 MR. WASSERMAN: I was going to say -- luckily, I'm  
25 short.

1 THE COURT: There you go.

2 MR. WASSERMAN: So, as this Court well knows, on at  
3 least ten prior occasions, I have applied for a comfort order  
4 lifting the automatic stay to the extent necessary to commit  
5 the insurers to pay settlements and/or legal fees from the LBHI  
6 DNO policies. Most recently, we came before the Court last  
7 month in connection with the New Jersey comfort order which was  
8 granted. Here today, the current and/or former LBHI's officers  
9 and directors, including members of the current board of  
10 directors, seeks similar relief in connection with the 1.05  
11 million dollar settlement that was reached in securities  
12 related actions that have been brought by six California  
13 municipalities.

14 We have outlined in our papers the various reasons why  
15 we believe that this comfort order is appropriate. I am not  
16 going to take the Court's time right now if I don't need to  
17 note those reasons, but what I will say is that despite this  
18 Court's ruling last month in connection with the New Jersey  
19 comfort order, the Essex plaintiffs for what is now the third  
20 time have filed what is the essentially the same limited  
21 objection to the comfort motion. And for the reasons that I  
22 will quickly discuss, we believe that motion should be denied.

23 First, it seems that --

24 THE COURT: You mean the objection should be denied.

25 MR. WASSERMAN: -- I'm sorry, that the objection

1 should be denied. Yes, Your Honor. Thank you.

2 The Essex plaintiffs' limited objection seems to be  
3 premised on the fact that the insured defendants have  
4 supposedly asked this Court to make a determination that the  
5 insurance proceeds from the settlement should be attributed to  
6 the 2007/2008 policy. This is essentially the same issue that  
7 they raised the last time in connection with the New Jersey  
8 motion.

9 First, Your Honor, as you know, we have not asked for  
10 this relief. Indeed, the Court last month in connection with  
11 the Essex objection on the New Jersey comfort order, stated,  
12 and I will quote: "One thing is clear. The motion itself is a  
13 motion for what we conveniently describe as a comfort order  
14 that authorizes party's interest to proceed with the proposed  
15 settlement but in no way constitutes a determination as to the  
16 underlying coverage issues. Even had there been no objection  
17 by the Essex plaintiff, the grant of this motion would have not  
18 constituted and does not constitute a determination of any  
19 coverage issues."

20 THE COURT: I think I said that very well.

21 MR. WASSERMAN: I think you did, and what you said  
22 even better that's one of the reasons why that would have been  
23 a waste of time.

24 So, we believe that the -- as the Court said, last  
25 month and holds just as true today. Second, as we've said in

1 our papers and we've said previously, we believe that Essex  
2 lacks standing to make this motion. And, third, as we've said  
3 in our papers and we said last time, no one is claiming, not  
4 even Essex, that the California municipality cases are not  
5 covered by the 2007 or 2008 policies. It's essentially an  
6 academic question which has been raised by the objectors.

7 So, unless the Court has any further questions, I will  
8 rest at this time.

9 THE COURT: I don't have any questions. Does Essex  
10 wish to say anything?

11 MR. DUFFY: Good morning, Your Honor. Todd Duffy,  
12 Anderson Kill & Olick for Essex Holdings USA, LLC. I promise  
13 to be extremely brief here.

14 Our objections are the same -- Mr. Wasserman has  
15 stated them correctly, but as Mr. Wasserman will I'm sure  
16 agree, one, simply because he's asserting that he's not asking  
17 for that relief in the last motion it wasn't clear to us that  
18 he wasn't asking for that relief in this motion. We are happy  
19 to put a limited objection in that we wanted to be clear that  
20 no one can misuse this order in a future proceeding. And it's  
21 that simple.

22 Thank you, Your Honor.

23 THE COURT: Okay. The motion is granted, and I  
24 incorporate by reference the statement made last month  
25 indicating that the comfort order in no way constitutes a

1 determination of coverage issues. The Essex limited objection  
2 is overruled.

3 MR. WASSERMAN: Thank you, Your Honor. I will now  
4 turn to the next motion on the calendar which is the comfort  
5 motion in connection with the debt equity class action. I  
6 think I can now say that on eleven prior occasions here, you  
7 have seemingly granted these types of motions and this is very  
8 similar to what we have before -- again, I represent the  
9 directors and officers who are seeking this type of relief in  
10 the comfort order and actually the settlement that was  
11 related -- or that was reached in connection with the  
12 securities action brought by the plaintiffs in the debt equity  
13 class action.

14 This class action was brought by plaintiffs under the  
15 securities act against certain of the directors and officers as  
16 well as under the exchange act with claims against certain  
17 other officers. This settlement has settled what is billions  
18 of dollars in alleged claims for nine million dollars. Not  
19 only does this settlement benefit the directors and officers,  
20 but it also has a benefit to the estate. Among other things,  
21 it provides a release by the equity debt class of the debtors  
22 as to certain claims relating to the debt equity class action,  
23 and it also provides for a disallowance of certain groups and  
24 complaints that have been filed against the debtors once  
25 certain conditions have been completed.

1           As we've discussed in our moving papers, this  
2       settlement is contingent upon the Court granting this comfort  
3       motion and granting the comfort order. Just so that there's no  
4       confusion, there have actually been a couple of orders which  
5       have been put before the Court in connection with this motion.  
6       The last was filed yesterday; we have given copies also to  
7       counsel for the estate. What this does is it gives --  
8       essentially updates the order to reflect the fact that whereas  
9       before it was based on a term sheet, in this instance, a  
10      settlement agreement was signed on Friday.

11           There are currently -- or there were two objections  
12      and one reservation of rights in connection with this motion.  
13      To first address the reservations and rights which was by the  
14      ERISA plaintiffs, I just want to say two short things. First,  
15      just to bring the Court up to speed, the District Court, Judge  
16      Kaplan, has recently granted our motion to dismiss that case  
17      with prejudice, though that said, the ERISA plaintiffs have  
18      appealed.

19           That said, while we disagree with the plaintiffs about  
20      the nature of their rights, they are certainly free to reserve  
21      them here today.

22           As far as the other two motions for the -- I'm sorry,  
23      the other two objections, there was an objection by the SASCO  
24      defendants and I can represent here today and I think it can be  
25      confirmed by counsel for the SASCO defense that that objection

1 is being withdrawn.

2 And then the third objection is the limited objection  
3 by Essex, and we will make the same statements that we made  
4 just a couple of weeks ago.

5 And unless the Court has any further questions, I will  
6 rest.

7 THE COURT: Okay. Should I do this in order, that  
8 would be the ERISA plaintiffs first, if they have anything to  
9 say? Is anybody here representing them?

10 Under the reservation of rights, as referenced by  
11 counsel from Dechert will be sufficient? The SASCO objection  
12 is withdrawn -- Mr. Duffy, shall I -- is the --

13 MR. LEDLEY: Yes, Your Honor, Michael Ledley from  
14 Wollmuth Maher & Deutsch for the SASCO defendants. I was just  
15 going to agree with my friend, Mr. Wasserman, and we've reached  
16 an agreement with the movants which resolves our objection and  
17 we are withdrawing it.

18 THE COURT: Fine. And then, Mr. Duffy, shall we just  
19 incorporate your comments from the last version?

20 MR. DUFFY: That would be terrific, Your Honor. Thank  
21 you both.

22 THE COURT: Fine. We'll incorporate his comments,  
23 we'll incorporate my comments and the motion is granted.

24 MR. DUFFY: Thank you, Your Honor.

25 MR. KRASNOW: Good morning, Your Honor. Richard

1 Krasnow, Weil, Gotshal & Manges, on behalf of the debtors. I  
2 will be addressing the last item on this morning's calendar and  
3 the last matter on the calendar relating to directors and  
4 officers settlements.

5 This is a motion by the debtors seeking authorization  
6 to Section 363 to accede to the request of the insurers which  
7 will be making settlement payments in connection with the New  
8 Jersey settlement and the debt equity settlement, to grant them  
9 releases solely in respect of the payments that they would be  
10 making under those settlements.

11 The debtors have concluded that it is reasonable and  
12 appropriate to grant the insurers' releases because of the  
13 benefits they will be reaping through the consummation of the  
14 settlement with the elimination of the indemnification claims  
15 or primary claims which while we may dispute them, nonetheless,  
16 are being resolved by the payments made by -- with other  
17 people's money and without the necessity for us to litigate  
18 them here beyond or proceeding by Section 363 rather than 9019,  
19 because while we are releasing claims, in fact the debtors have  
20 no claims under these policies against the insurers.

21 And Your Honor will recall, there are two sides to the  
22 policies in question. Side A as to which the sole  
23 beneficiaries are the current and former officers, directors  
24 and employees. The only claims that the debtors could have  
25 would be on the Side B, which is limited to a reimbursement

1 claim which has secondary priority to claims under Side A. We,  
2 the debtors, have no claim under Side B with respect to these  
3 particular actions in this particular payment.

4 So, if you will -- we'll not settling the dispute  
5 because there is none, which again is the reason why we  
6 proceeded under 363 rather than 9019.

7 Your Honor, once again, Essex has elected to file an  
8 objection to a DNO-related motion. It is premised on the same  
9 contentions that they made in respect to the other motions,  
10 that somehow we have requested some determination by the Court  
11 with respect to coverage. If that is a motion before the  
12 Court, it's not one that we filed and we just wanted the  
13 defense to be considered by the Court today. Your Honor, we  
14 adopt the arguments, if you will, that were made by Mr.  
15 Wasserman in response to that objection and request that the  
16 Court make the same ruling and grant the motion.

17 Thank you.

18 THE COURT: Thank you.

19 Mr. Duffy, do you incorporate your same remarks or do  
20 you have some new ones?

21 MR. DUFFY: I do, Your Honor. I do incorporate them  
22 on this motion.

23 THE COURT: All right. Fine. And once again, the  
24 limited objection of Essex is overruled. The motion to grant  
25 releases in connection with the New Jersey debt equity

1 litigation of the affected insurers is granted.

2 MR. KRASKOW: Thank you, Your Honor. I believe that  
3 concludes the calendar for this morning.

4 THE COURT: Fine. We are then adjourned and you can  
5 hand up the forms of order to my clerks. Thank you.

6 See you next time.

7 MR. KRASKOW: Thank you, Your Honor.

8 (Whereupon these proceedings were concluded at 12:06 PM)

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C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true  
and accurate record of the proceedings.

Dena  
Page

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Date: October 21, 2011